DOCKET FILE COPY ORIGINAL

THE BALLER HERBST LAW GROUP

A PROFESSIONAL CORPORATION
2014 P STREET, N.W.
SUITE 200
WASHINGTON, D.C. 20036
(202) 833-5300
FAX: (202) 833-1180

MINNEAPOLIS OFFICE:
953E GRAIN EXCHANGE BUILDING
400 SOUTH FOURTH STREET
MINNEAPOLIS, MN 55415

April 24, 2001

Ms. Magalie Roman Salas
Office of the Secretary
Federal Communications Commission
The Portals
445 Twelfth Street, TW-B204
Washington, D.C. 20554

re: Comments of City Utilities of Springfield, Missouri, on the Application by SBC Communications, Inc. for Authorization Under Section 271 of the Communications Act, *CC DocketNo. 01-88*

Dear Madam:

Enclosed are an Original plus Four (4) Copies for filing in response to the Application by SBC Communications, Inc. for Authorization Under Section 271 of the Communications Act, *CC DocketNo. 01-88.* Also enclosed is a 3.5" diskette with a copy of the comments that are to be filed as requested in the Public Notice released on April 4, 2001.

I have included one additional copy within this packet that should be time-stamp and returned.

Please let me know at (202) 833-5300 if you have any questions.

Sincerely,

James Baller

Enclosures

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Missouri

CC Docket No. 01-88

To: The Commission

COMMENTS OF CITY UTILITIES OF SPRINGFIELD, MISSOURI CONDITIONALLY OPPOSING SOUTHWESTERN BELL'S APPLICATION FOR LEAVE TO PROVIDE IN-REGION, INTERLATA SERVICES IN MISSOURI

James Baller
Sean A. Stokes
The Baller Herbst Law Group, P.C.
1820 Jefferson Place, N.W.
Suite 200
Washington, D.C. 20036
(202) 833-5300 (phone)
(202) 833-1180 (fax)
jim@baller.com (Internet)

William Andrew Dalton
General Counsel
City Utilities of Springfield, MO
301 E. Central Street
P.O. Box 551
Springfield, MO 65801
(417) 831-8604 (phone)
(417) 831-8802 (fax)

April 24, 2001

SUMMARY OF CITY UTILITIES' COMMENTS

In its recent Missouri preemption decision, the Commission found that the Missouri barrier to municipal entry is unwise, unnecessary to meet any legitimate state interest, and contrary to the purposes and policies of the Telecommunications Act of 1996. Three commissioners filed separate statements to underscore these points. Nevertheless, the Commission found that it could not give weight to these public-interest considerations in construing the term "any entity" in Section 253(a) of the Act, because "the legal authorities that we must look to in this case compel us to deny the Missouri Municipals' petition."

In this proceeding, Section 271 of the Act not only imposes on the Commission the authority, but also the duty, to take into account the public-interest considerations that the Commission said it could not reach in the *Missouri Order*. In view of these considerations, coupled with Southwestern Bell's admission that competition is virtually non-existent in all but the major metropolitan areas in Missouri, City Utilities submits that the Commission should either reject Southwestern Bell's application outright or require Southwestern Bell to take the following actions as a condition of the Commission's approval:

1. Cease and desist from promoting or supporting, before any state or local governmental entity in Missouri, any measure that may explicitly or effectively prohibit any entity, including any public entity, from providing directly or indirectly any telecommunications service.

2. Furnish the governor, the leaders of both parties in each chamber of the Missouri legislature, the chairmen and ranking minority members of the legislative committees with jurisdiction over telecommunications matters, the chair of the public service commission, and the chief elected official of each city, county and town that Southwestern Bell serves in Missouri, a written statement that Southwestern Bell opposes adoption or extension of any legislative or regulatory measure, and supports repeal of any existing measure, that may explicitly or effectively prohibit any entity, including any public entity, from providing any telecommunications service directly or indirectly.

TABLE OF CONTENTS

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Missouri	CC Docket No. 01-88

To: The Commission

COMMENTS OF CITY UTILITIES OF SPRINGFIELD, MISSOURI CONDITIONALLY OPPOSING SOUTHWESTERN BELL'S APPLICATION FOR LEAVE TO PROVIDE IN-REGION, INTERLATA SERVICES IN MISSOURI

In its recent Missouri preemption decision, the Commission found that the Missouri barrier to municipal entry is unwise, unnecessary to meet any legitimate state interest, and contrary to the purposes and policies of the Telecommunications Act of 1996.[1] Three commissioners filed separate statements to underscore these points. Nevertheless, the Commission found that it could not give weight to these public-interest considerations in construing the term "any entity" in Section 253(a) of the Act, because "the legal authorities that we must look to in this case compel us to deny the Missouri Municipals' petition."[2]

In this proceeding, Section 271 of the Act not only imposes on the Commission the authority, but also the duty, to take into account the public-interest considerations that the

---

1 *In re Missouri Municipal League, et al.*, FCC 00-443, 2001 WL 28068, at ¶ 10-11 (rel. January 12, 2001) ("*Missouri Order*"); appeal pending, *Missouri Municipal League v. FCC*, No. 01-1379 (8th Cir., filed Jan. 13, 2001).

2 Relying upon *Gregory v. Ashcroft*, 501 U.S. 252 (1991), and *City of Abilene v. FCC*, 164 F.3d 49 (D.C. Cir. 1999), the Commission held that Congress had not made a sufficiently "plain statement" in Section 253(a) that it intended to protect public entities from state barriers to entry. *Missouri Order* ¶¶ 5, 14.

Commission said it could not reach in the *Missouri Order*. City Utilities submits that these considerations, coupled with Southwestern Bell's admission that competition is virtually non-existent in all but the major metropolitan areas in Missouri, requires the Commission either to reject Southwestern Bell's application outright or to require Southwestern Bell to take the actions recommended below, as a condition to the Commission's approval.

INTEREST OF CITY UTILITIES OF SPRINGFIELD, MISSOURI

City Utilities provides municipal electric, gas, water and transportation utilities in Springfield, Missouri. City Utilities was a party to the Missouri preemption proceeding before the Commission and is currently a party to the petition for review of the *Missouri Order* filed with the Eighth Circuit. As the record of the Missouri case demonstrates, City Utilities has constructed a sophisticated communications network primarily for its own core utility needs, and it now stands ready, able and eager to use that network to provide or facilitate the provision of advanced communications services in Springfield. City Utilities is owned by the people of Springfield, Missouri, who want to take maximum advantage of City Utilities' assets and expertise to promote economic development, educational and occupational opportunity, and quality of life in Springfield.

THE "PUBLIC INTEREST" STANDARD OF SECTION 271

As Southwestern Bell acknowledges in its *Brief in Support of Application By Southwestern Bell For Provision Of In-Region, InterLata Services in Missouri* at 85 (filed April 4, 2001) ("*Southwestern Bell's Brief*"), "[u]nder section 271, this Commission is required to determine whether InterLATA entry 'is consistent with the public interest, convenience, and necessity.' 47 U.S.C. § 271(d)(3)(C)." Specifically, that provision states, in relevant part, as follows:

> SEC. 271. [47 U.S.C. 271] BELL OPERATING COMPANY ENTRY INTO INTERLATA SERVICES.
>
> (d) ADMINISTRATIVE PROVISIONS.--
>
> (3) DETERMINATION.--Not later than 90 days after receiving an application under paragraph (1), the Commission shall issue a written determination approving or denying the authorization requested in the application for each State. The Commission *shall not approve* the authorization requested in an application submitted under paragraph (1) *unless* it finds that--
>
> ...
>
> (C) the requested authorization is consistent with the public interest, convenience, and necessity.
>
> The Commission *shall* state the basis for its approval or denial of the application.

Id. (emphasis added).

In its recent decision approving Verizon's entry into long distance services in Massachusetts, the Commission observed that

> *Separate from determining whether a BOC satisfies the competitive checklist and will comply with section 272*, Congress directed the Commission to assess whether the requested authorization would be consistent with the public interest, convenience, and necessity. . . .
>
> We view the public interest requirement as an opportunity to review the circumstances presented by the application to ensure that no other relevant factors exist that would frustrate the congressional intent that markets be open, as required by the competitive checklist, and that entry will therefore serve the public interest as Congress expected. Among other things, we may review the local and long distance markets to ensure that there are not unusual circumstances that would make entry contrary to the public interest under the particular circumstances of this application. Another factor that could be relevant to our analysis is whether we have sufficient assurance that markets will remain open after grant of the application. While no one factor is dispositive in this analysis, our overriding goal is to ensure that nothing undermines our conclusion, based on our analysis of checklist compliance, that this market is open to competition.
>
> . . .
>
> . . . [S]everal commenters suggest that the state of competition for residential services in Massachusetts indicates that this market is not yet truly open. Given an affirmative showing that a market is open and the competitive checklist has been satisfied, low customer volumes in and of themselves do not undermine that showing. *Factors beyond a BOC's control, such as individual competitive LEC entry strategies, might explain a low residential customer base.* We note that Congress specifically declined to adopt a market share or other similar test for BOC entry into long distance, and we have no intention of establishing one here.

In the Matter of Application of Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions) And Verizon Global Networks Inc., For Authorization to Provide In-Region, InterLATA Services in Massachusetts, CC Docket 01-9, *Memorandum Opinion and Order*, ¶¶ 232, 233, 235 (rel. April 16, 2001) (emphasis added) (footnotes omitted).

As the Commission summarized the "public interest" standard above, it has features that are relevant here: (1) the Commission is obligated to apply it even if a Bell Operating Company (BOC) otherwise establishes that it has met the fourteen-point competitive checklist in Section 271; (2) the Commission must "ensure that no other relevant factors exist that would frustrate the congressional intent that markets be open," including whether there are "unusual circumstances that would make entry contrary to the public interest under the particular circumstances of [a particular] application;" (3) the Commission's "overriding goal" must be to ensure that there is nothing present that "undermines our conclusion, based on our analysis of checklist compliance, that this market is open to competition;" and (4) that while "low customer volumes in and of themselves do not undermine" the conclusion that the public interest requires approval of leave to provide long distance service, evidence of low customer volumes *in combination with evidence of actions within a BOC's control to stifle competition*, do undermine the conclusion that approval of a BOC's entry into long distance service is in the public interest.

THE COMMISSION'S *MISSOURI ORDER*

In the Missouri preemption proceeding, acting pursuant to Section 253 of the Telecommunications Act, the Commission examined the legality of Section 392.410(7) of the Missouri Statutes (HB 620). That provision states, in relevant part, that "[n]o political subdivision of this state shall provide or offer for sale, either to the public or to a

telecommunications provider, a telecommunications service or telecommunications facility used to provide a telecommunications service." The Commission *unanimously* found that HB 620 is unwise and contrary to the purposes of the Telecommunications Act:

> [M]unicipally-owned utilities and other utilities have the potential to become major competitors in the telecommunications industry. In particular, we believe that the entry of municipally-owned utilities can further the goal of the 1996 Act to bring the benefits of competition to all Americans, particularly those who live in small or rural communities. We emphasized this fact in our August 2000 report on the deployment of advanced services. In that report, we presented a case study detailing advanced services deployment in Muscatine, Iowa where the municipal utility competes with other carriers to provide advanced services to residential customers. . . . Our case study is consistent with APPA's statements in the record here that municipally-owned utilities are well positioned to compete in rural areas, particularly for advanced telecommunications services, because they have facilities in place now that can support the provision of voice, video, and data services either by the utilities, themselves, or by other providers that can lease the facilities.

Missouri Order, ¶ 10.

The Commission also found HB 620 to be unnecessary to achieve any legitimate state purpose:

> We continue to recognize, as the Commission did in the *Texas Preemption Order*, that municipal entry into telecommunications could raise issues regarding taxpayer protection from economic risks of entry, as well as questions concerning possible regulatory bias when a municipality acts as both a regulator and a competitor. While some parties maintain that these types of advantages make it unfair to allow municipalities and municipally-owned utilities to compete with private carriers, we believe these issues can be dealt with successfully through measures that are much less restrictive than an outright ban on entry, such as through non-discrimination requirements that require the municipal entity to operate in a manner that is separate from the municipality, thereby permitting consumers to reap the benefits of increased competition.

Missouri Order, ¶ 10.

Nevertheless, the Commission upheld the Missouri law, finding that "the legal authorities that we must look to in this case compel us to deny the Missouri Municipals' petition." *Missouri Order*, ¶ 10. Chairman William Kennard and Commissioner Gloria Tristani jointly filed a

separate statement to emphasize that this result, "while legally required, is not the right result for consumers in Missouri." "Unfortunately," they continued, "the Commission is constrained in its authority to preempt HB 620 by the D.C. Circuit's *City of Abilene* decision and the U.S. Supreme Court's decision in *Gregory v. Ashcroft*."

Similarly, Commissioner Susan Ness observed in her own separate statement that

> I write separately to underscore that today's decision not to preempt a Missouri statute does not indicate support for a policy that eliminates competitors from the marketplace. In passing the Telecommunications Act of 1996, Congress sought to promote competition for the benefit of American consumers.
>
> In the Telecommunications Act, Congress recognized the competitive potential of utilities and, in section 253, sought to prevent complete prohibitions on utility entry into telecommunications. The courts have concluded, however, that section 253 is not sufficiently clear to permit interference with the relationship between a state and its political subdivisions. [Citing *Abilene*].
>
> Nevertheless, municipal utilities can serve as key players in the effort to bring competition to communities across the country, especially those in rural areas. In our recent report on the deployment of advanced telecommunications services, we examined Muscatine, Iowa, a town in which the municipal utility was the first to deploy broadband facilities to residential consumers. The telephone and cable companies in Muscatine responded to this competition by deploying their own high-speed services, thereby offering consumers a choice of three broadband providers. It is unfortunate that consumers in Missouri will not benefit from the additional competition that their neighbors to the north enjoy.

In the appeal of the *Missouri Order*, the Eighth Circuit will eventually determine whether *Gregory* and *Abilene* did indeed preclude the Commission from taking its public-interest findings into account in interpreting Section 253(a), or whether, as the petitioners argue, the Commission was affirmatively *required* to take these findings into account in interpreting the term "any entity." However the Court may decide the *legal effect* of the Commission's public-interest findings for the purposes of Section 253(a), the findings themselves are fully supported in the Missouri record and are highly relevant to the Commission's duties in this proceeding under Section 271.

UNCONDITIONAL APPROVAL OF SOUTHWESTERN BELL'S ENTRY INTO IN REGION, INTERLATA SERVICES IN MISSOURI WOULD BE CONTRARY TO THE PUBLIC INTEREST

In its brief supporting its application for leave to enter the long distance market in Missouri, Southwestern Bell backhandedly acknowledges that virtually no competition exists in Missouri outside its major metropolitan areas:

> . . . [A]lthough most CLECs in Missouri, like elsewhere, concentrate on major metropolitan areas, local competition is arriving in Missouri's rural areas as well. CLECs are currently serving customers in Cedar Hill (population 234), Neosho (population 9,531), and Joplin (population 44,612).

Southwestern Bell's Brief at 8. In Southwestern Bell's entire brief of 98 pages, this is the only reference to the status of competition in Missouri's rural areas. This is sad, but eloquent proof that, five years after the enactment of the Telecommunications Act, a *vast* Digital Divide exists between metropolitan and rural areas in Missouri.

Furthermore, Southwestern Bell's admission that competition is all but non-existent in Missouri's rural areas must be read against the backdrop of Southwestern Bell's vigorous sponsorship and advocacy of HB 620. Not only did Southwestern Bell push that measure through the Missouri legislature, but it has subsequently worked diligently to uphold HB 620 before the Commission and now before the Eighth Circuit. These actions in Missouri mirror Southwestern Bell's aggressive legislative, administrative and judicial support for the Texas barrier to entry that was at issue in the *Abilene* case.

As the Commission unequivocally found in the Missouri Order, HB 620 is contrary to the public interest as well as inconsistent with the purposes of the Telecommunications Act. It follows that Southwestern Bell's promotion and continuing advocacy of that law is also contrary to the public interest and inconsistent with the purposes of the Telecommunications Act. In the terminology of the Commission's recent Verizon/Massachusetts order, these actions "frustrate

the congressional intent that markets be open," and they undermine the Commission's "overriding goal" of ensuring "nothing undermines our conclusion . . . that this market is open to competition." Furthermore, Southwestern Bell's actions are not "beyond the BOC's control," and they can be tied directly to the miniscule amount of competition in rural areas of Missouri that, according to the Commission's own findings in the *Missouri Order*, would now have meaningful competition in the absence of HB 620.

CONCLUSIONS AND RECOMMENDATIONS

For the reasons discussed above, Southwestern Bell cannot demonstrate that its entry into the long distance market in Missouri would be in the public interest. Even if Southwestern Bell could show that it has met the 14-point checklist, its past and ongoing support for the anti-competitive HB 620 cannot be reconciled with the separate and additional public-interest standard under Section 271(d)(3)(C) that Southwestern Bell must meet to be granted leave to provide long distance services in Missouri. The Commission should, therefore, reject Southwestern Bell's application in its entirety. At a minimum, the Commission should require Southwestern Bell to agree to satisfy the following additional conditions as a prerequisite to the Commission's approval of its application:

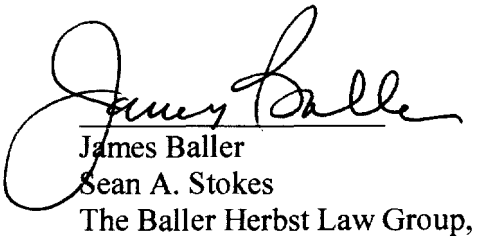
1. Cease and desist from promoting or supporting, before any state or local governmental entity in Missouri, any measure that may explicitly or effectively prohibit any entity, including any public entity, from providing directly or indirectly any telecommunications service.

2. Furnish the governor, the leaders of both parties in each chamber of the Missouri legislature, the chairmen and ranking minority members of the legislative committees with jurisdiction over telecommunications matters, the chair of the public service commission, and the chief elected official of each city, county and town that Southwestern Bell serves in Missouri, a written statement that Southwestern Bell opposes adoption or extension of any legislative or regulatory measure, and supports repeal of any existing measure, that may explicitly or effectively prohibit any entity, including any public entity, from providing any telecommunications service directly or indirectly.

The latter recommendation is particularly important because the HB 620, by its terms, sunsets on August 28, 2002, and a commitment by Southwestern Bell to oppose extension could have a significant impact on the Missouri legislature.

Southwestern Bell may object that City Utilities' proposed remedy would violate Southwestern Bell's right to free speech under the First Amendment. Southwestern Bell is, of course, free to do and say what it wishes. But when coming to the Commission for leave to enter the long distance market, Southwestern Bell must prove under that this would be in the public interest. Like many other pro-competitive provisions of the Telecommunications Act, Section 271(d)(3)(C) requires Southwestern Bell to act pro-competitively in return for the right to reap the benefits of entry into a lucrative new market. The choice is Southwestern Bell's.

Respectfully submitted,



James Baller
Sean A. Stokes
The Baller Herbst Law Group, P.C.
1820 Jefferson Place, N.W.
Suite 200
Washington, D.C. 20036
(202) 833-5300 (phone)
(202) 833-1180 (fax)
jim@baller.com (Internet)

William Andrew Dalton
General Counsel
City Utilities of Springfield, MO
301 E. Central Street
P.O. Box 551
Springfield, MO 65801
(417) 831-8604 (phone)
(417) 831-8802 (fax)

April 24, 2001

CERTIFICATE OF SERVICE

I, James Baller, hereby certify that on this 24th day of April 2001, I caused copies of the foregoing Comments for Authorized Section 271 of the Communications Act to be served on the parties on the attached Service List by first-class U.S. Mail.

By U.S. Mail:

Jane E. Mago, General Counsel
Office of the General Counsel
Federal Communications Commission
445 Twelfth Street, S.W., TW-A325
Washington, D.C. 20554

Ms. Magalie Roman Salas
Office of the Secretary
Federal Communications Commission
The Portals
445 Twelfth Street, S.W. TW-B204
Washington, D.C. 20554

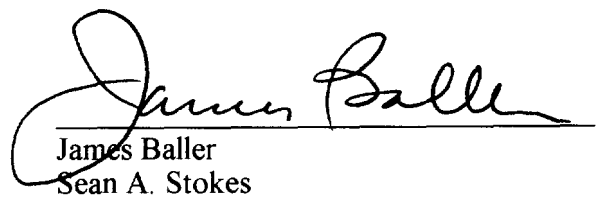
Janice M. Myles
Federal Communications Commission
Common Carrier Bureau, Room 5-C327
445 Twelfth Street, S.W.,
Washington, D.C. 20554

Geoffrey M. Klineberg
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036-3209

Jill Lyons
UTC, The Telecommunications Association
1140 Connecticut Avenue, N.W., Suite 1140
Washington, D.C. 20036

Jeremiah W. (Jay) Nixon
Ronald Molteni
Office of the Attorney General
Supreme Court Building
207 W. High Street, P.O. Box 899
Jefferson City, MO 65102

ITS, Inc.
445 12th Street, S.W.
Room CY-314
Washington, D.C. 20554



James Baller
Sean A. Stokes
THE BALLER HERBST LAW GROUP, P.C.
2014 P. Street, N.W., Suite 200
Washington, D.C. 20036

(202) 833-5300 (phone)
(202)833-1180 (fax)
jim@baller.com (Internet)

Attorneys for the
Petitioners

April 24, 2001